UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

YANKEE GAS SERVICES COMPANY Employer and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNIONS 420 AND 457, AFL-CIO Petitioner	Case No. 34-RC-2084

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, the Petitioner and the Employer waived their right to a hearing before a hearing officer of the National Labor Relations Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I find that: the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction; the labor organization involved claims to represent certain employees of the Employer; and that a question affecting commerce exists concerning the representation of certain employees of the Employer.

The Employer is a public utility engaged in providing gas fuel to homes and businesses. In Case No. 34-RC-2079, one of the instant Petitioners, IBEW Local 457, filed a petition seeking to represent a unit of approximately 10 full-time and regular part-time Specialist Operations Support (SOS) employees employed by the Employer at its East Windsor, Meriden, Danielson and Waterford facilities. The Employer contended in that case that the petition should be dismissed either because all of the petitioned-for employees were supervisors within the meaning of the Act, or because the only appropriate unit must include all 20 of the Employer's SOS employees in the State of Connecticut. In a Decision and Order dated June 10, 2004 (relevant portions of which are attached hereto as Appendix A and incorporated herein), the undersigned found,

inter alia, that the SOS are not supervisors, but that the petitioned-for unit was not an appropriate unit because it did not include all of the Employer's SOS in the State of Connecticut. The petition was dismissed because IBEW Local 457 had not indicated a willingness to proceed to an election in a broader unit. In this regard, the record in that case reflected that IBEW Local 457's jurisdiction is limited to the "eastern" portion of the State of Connecticut, and that its "sister local", IBEW Local 420, has jurisdiction over the remaining "western" portions of the State. The Petitioner did not file a request for review of the Decision and Order. The Employer's Request for Review of the portion of the Decision and Order finding that the SOS are not supervisors is pending before the Board.

In the instant case, IBEW Local 457 and IBEW Local 420 have jointly petitioned to represent all of the Employer's SOS employees. As noted above, the parties waived their right to a hearing in this matter, and instead entered into a stipulation in which they agreed that "[t]he hearing record, briefs and Request for Review in Case No. 34-RC-2079 will constitute the entire record for Case No. 34-RC-2084."

Based upon the foregoing, it is clear that the Petitioner and the Employer are presently in accord as to all issues except the supervisory status of the SOS. For the reasons set forth below, the undersigned finds that the contentions raised by the Employer in its Request for Review in Case No. 34-RC-2079 do not alter the previous determination that the SOS are not supervisors within the meaning of Section 2(11) of the Act.

The Employer has contended that the testimony proffered by the Petitioner's sole witness, Jason Aziz, should be discredited and not relied upon in making a supervisory determination regarding the SOS. In this regard, I note that *Sears, Roebuck & Co*., 304 NLRB 193 (1991), the case relied upon by the Employer for its assertion that "credibility determinations are in fact made by hearing officers in cases such as this one where the Board is called upon to determine the 'supervisory' status of employees", involved a hearing on *post-election objections*. In *pre-election hearings* such as the instant case, it is well-established that such a hearing is "investigatory in nature and credibility resolutions are not made." *Marian Manor for the Aged*, 333 NLRB 1084 (2001). Moreover, there is no evidence to support the Employer's contention that Aziz's testimony regarding his duties as an on-call supervisor must be ignored because it is

contradicted by documentary evidence. In this regard, the Employer relies upon an undated document prepared by Aziz concerning his job duties in which he stated, *inter alia*, that he "coordinate[s] and provide[s] work to Yankee Gas and contractor crews", "provide[s] direction and technical assistance to other field personnel", and "direct[s] the work of [6-10] other employees". None of those statements contradicts any of Aziz's testimony regarding his job duties, nor do they, standing alone, support a supervisory finding. Furthermore, Aziz explained that the 6-10 other employees he was referring to were his fellow SOS, and that the direction he provided to such employees was technical in nature based upon his extensive experience. He further explained, without contradiction, that he has no involvement in assigning work to Yankee Gas crews, nor does he interact with such crews in the performance of their work.

The Employer also contends that "testimony in the record" coupled with the SOS job descriptions contradicts the undersigned's previous finding that there is no evidence that the SOS exercise any of the indicia of supervisory status while performing their work duties during their normal workday. However, the Employer provides no citation to any such testimonial evidence, and there is nothing in the SOS job description that, standing alone, supports a finding of supervisory status.[1] Moreover, the case cited by the Employer, *Custom Bronze & Aluminum Corp*., 197 NLRB 397 (1972), does not support its contention that the SOS responsibly direct the work of other employees. In this regard, the individual found to be a supervisor in that case assigned work to employees based upon his own evaluation of their abilities, verified their time, and was clearly in charge of all daily production.

The Employer further contends that in analyzing the SOS's alleged supervisory status based upon their serving as on-call supervisors outside their normal workday, the undersigned erroneously relied upon the Board's standard in *Gaines Electric Co*., 309 NLRB 1077 (1992) and *Aladdin Hotel*, 270 NLRB 838, 840 (1984) for determining the status of employees who "substitute" for acknowledged supervisors. In this regard, the Employer argues that the SOS do not "substitute" for acknowledged supervisors while serving as an on-call supervisor, because their job duties require them to serve in that

[1] To the extent that the Employer relies upon an allegedly revised job description prepared by the SOS employees in 2003, there is no dispute that the revised job description has never been put into effect. Even assuming arguendo that it was to be put into effect, there is similarly no language in the revised job description which, standing alone, supports a finding of supervisory status.

position, thus making it a regular part of their job duties. However, the Employer further argues that although the on-call supervisor has the same "status" and "job responsibilities" as the area manager, an acknowledged supervisor, it does not amount to "substituting" for an acknowledged supervisor. Inasmuch as the Employer admits that the on-call supervisor essentially "stands-in" for or "replaces" the area manager outside the regular workday, it is entirely appropriate to apply the *Gaines* and *Aladdin* standard for determining the supervisory status of the SOS who serve as on-call supervisors.[2] As noted in the Decision and Order, even assuming *arguendo* that under *Gaines* and *Aladdin*, the SOS spend a regular and substantial amount of their work time as an on-call supervisor, the Employer failed to establish that they possess and exercise supervisory authority within the meaning of Section 2(11) of the Act while serving in that capacity. Thus, contrary to the Employer's contention, the applicability of the *Gaines* and *Aladdin* standard ultimately has no effect upon the determination as to whether the SOS are supervisors under the Act.[3]

The Employer further contends that certain secondary indicia support a finding that the SOS are supervisors. More particularly, the Employer relies upon the ratio of supervisors to non-supervisors, differences in terms and conditions of employment, and ostensible or apparent authority. However, as noted in the Decision and Order, such secondary indicia cannot confer supervisory status in the absence of the primary indicia of supervisory status enunciated in Section 2(11) of the Act. In addition, the cases cited by the Employer do not support its contention that the secondary indicia in the instant

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[2] In this regard, I note that the Random House Thesaurus, College Edition (1984), offers the following synonyms for "substitute": "*replacement*, fill-in, surrogate, take over, *stand-in*, pinch hit, and alternate." (emphasis supplied). All of these synonyms support the logical conclusion that the on-call supervisors are "substituting" for the area manager outside the normal workday.

[3] With regard to whether the SOS who serve as on-call supervisors do so for a substantial period of time, the Employer relies solely upon the total number of hours that the SOS serve in the on-call position, i.e., 125 hours per week from five to nine weeks per year, representing as much as 38% of their total "time". However, as noted in the Decision and Order, the actual number of hours spent by each SOS performing alleged supervisory duties while serving as an on-call supervisor, i.e., between 0 and 15%, with an average of about 5%, is significantly less than the total number of hours spent as an on-call supervisor. Moreover, the cases cited by the Employer do not support its contention that the SOS spend a "substantial" amount of their worktime as on-call supervisors. In this regard, in *Latas de Aluminio Reynolds*, 276 NLRB 1313 (1985), an employee was found not to be a supervisor because the periods of supervisory substitution were found to be temporary and sporadic. In *Hexacomb Corp*., 313 NLRB 983 (1994), the employee was found not to be a supervisor because the periods of substitution were limited to about 8-10% of his time and was irregular and sporadic. In *Canonie Transportation,* 289 NLRB 299 (1988), the employee found to be a supervisor served as an acting supervisor for a period of 17 weeks (32% of the work year), clearly a substantial period of time.

case support a finding of supervisory status. In *Training School of Vineland*, 332 NLRB No. 152 (2000), *Chrome Deposit Corp*., 323 NLRB 961 (1997), *Ken Crest Services*, 335 NLRB No. 63 (2001), and *North Shore Weeklies*, 317 NLRB 1128 (1995), the Board in each case specifically refused to rely on certain secondary indicia of supervisory status because of the absence of any primary indicia of supervisory status. Although the Board in *Penn Truck Lines*, 199 NLRB 641 (1972), *Illini Steel Fabricators*, 197 NLRB 303 (1972), *Grand Union Co*., 193 NLRB 525 (1971), and *Little Rock Hardboard Co.,* 140 NLRB 264 (1962) relied upon certain secondary indicia of supervisory status to support its findings that certain disputed employees were supervisors, in each case the disputed employees possessed and exercised several of the primary indicia of supervisory status enumerated under Section 2(11) of the Act.

Even assuming *arguendo* that the secondary indicia cited by the Employer were considered in determining the supervisory status of the SOS, they do not support the Employer's contention that they establish supervisory status. With regard to the ratio of supervisors to non-supervisors, the Employer argues that if the SOS are not supervisors,

> there would be no On-Call Supervisor to cover between 20% and 40% of the on-call rotations throughout the Yankee system. The SOS are a critical component of the Yankee Emergency Plan and to eliminate them from that plan would place tremendous pressures on existing resources. For instance, in locations where the current rotation is 1 in 9 with the SOS in the rotation, by eliminating the SOS from their On-Call Supervisory role the rotation moves to approximately 1 in 5.

However, there is no evidence to support the Employer's argument that it will not be able to utilize the SOS as on-call supervisors if they are found not to be supervisory employees within the meaning of the Act, or that there would be "tremendous pressures on existing resources" if the SOS are removed from the on-call supervisory rotation. To the contrary, the record reveals no obstacle to continuing to use the SOS as on-call supervisors even if they are found not to be supervisors within the meaning of the Act. If the Employer chooses in the future not to use the SOS employees as on-call supervisors, the record reflects that it has a readily available pool of other employees,

supervisors, managers and directors, which it already utilizes, to serve as on-call supervisors.[4]

With regard to the differences in terms and conditions of employment between the SOS and the bargaining unit employees they allegedly supervise, the Employer points to "vastly different" wages, the fact that the SOS are considered "exempt" employees who do not receive overtime pay, and that the SOS are treated the same, for compensation purposes, as other supervisors, managers and directors while serving as an on-call supervisor. However, as noted in the Decision and Order, the SOS are paid $40 per hour for all time spent as an on-call supervisor at the scene of an emergency, and that such rate is approximately the same as the time and one-half overtime rate received by bargaining unit employees. With regard to their wages, the record reveals that SOS are paid a salary of between $40,000 and $70,000 per year depending upon their particular qualifications and years of service. As noted in the Decision and Order, the average annual salary for all SOS employees in 2003, exclusive of additional compensation received for on-call supervisory work, was $51,000. In contrast, in calendar year 2003, the wage range for bargaining unit employees, who are paid on an hourly basis pursuant to the collective bargaining agreement, was $32,323 to $61,630. The two employee classifications that the SOS would most directly interact with as an on-call supervisor, the Distribution Mechanic and the Meter Service Mechanic, in 2003 annually earned comparable wages of $49,192 and $46,904, respectively. The record further reflects that with the significant amounts of overtime earned by many bargaining unit employees, particularly the Distribution Mechanic and the Meter Service Mechanic, their annual pay regularly exceeds the annual pay received by most SOS employees. See *Ken Crest Services*, supra, at fn. 16.

With regard to the "ostensible or apparent authority" allegedly exercised by the SOS while serving as an on-call supervisor, the Employer cites several cases for the proposition that the Board may rely on such authority in making a supervisory determination. Contrary to the Employer's contention, however, in *Poly-America, Inc*., 328 NLRB 667 (1999), *Hausner Hard Chrome of Kentucky, Inc.,* 326 NLRB 426 (1998), and *SAIA Motor Freight, Inc*., 334 NLRB 979 (2001), the Board relied upon ostensible or

[4] None of the cases cited by the Employer support its argument that the absence of the SOS from the on-call supervisory rotation requires a finding of supervisory status.

apparent authority to find that certain employees were agents, not supervisors. While the Board did find individuals to be supervisors in both *Wolverine World Wide*, 196 NLRB 410 (1972), and *Bama Co*., 145 NLRB 1141 (1964), those individuals clearly exercised several of the primary indicia of supervisory authority, and there was specific evidence that employees were instructed to do as they were told by the alleged supervisors or looked to them as their supervisor. In contrast, the SOS do not possess any of the primary indicia of supervisory status, and there is no testimonial evidence that any employee has been instructed to do as they are told by the SOS or that they look to the SOS as their supervisor. See *Ken Crest Services*, supra, at fn. 16.

Finally, with regard to the on-call supervisory training received by the SOS, the Employer notes that the training "covered the Union contract procedure for calling out bargaining unit employees and discussed circumstances when the On-Call Supervisor may have to 'force' the 'low man" to work". However, there is no record evidence that any SOS serving as an on-call supervisor has ever had to "force" an employee to work. To the contrary, the record reflects that employees who are on the on-call list set up pursuant to the collective bargaining agreement must report to work if they are called, and that all other employees who may be called by the on-call supervisor (usually through the dispatcher) in the event of an emergency are *not* required to report to work. The Employer also notes that the on-call supervisory training "covered the process for seeking mutual assistance from personnel from other areas when a particular area had insufficient resources to handle an emergency situation". However, the record reflects that such "mutual assistance" merely consists of an on-call supervisor contacting his or her counterpart in an adjacent area to determine whether they have any employees who would voluntarily agree to work in the former's area to cover for a shortage of available employees in that area. Thus, there is no evidence that through the "mutual assistance" process, the on-call supervisor can require any employee from another area to work in their area, or can require an employee from their area to work in another area.

Accordingly, I find that the SOS are not supervisors within the meaning of the Act, and that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Specialist Operations Support (SOS) employees employed by the Employer at its facilities located in the State of Connecticut; but excluding all other employees and guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate herein at the time and place set forth in the notices of election to be issued subsequently.

Eligible to vote: those employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were in the military services of the United States, ill, on vacation, or temporarily laid off; and employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements.

Ineligible to vote: employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the strike's commencement and who have not been rehired or reinstated before the election date: and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

The eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by International Brotherhood of Electrical Workers, Local Unions 420 and 457, AFL-CIO.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, an eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The

undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, 280 Trumbull Street, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103, on or before July 14, 2004. No extension of time to file these lists shall be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by July 21, 2004.

Dated at Hartford, Connecticut this 7th day of July, 2004.

/s/ Peter B. Hoffman
Peter B. Hoffman, Regional Director
Region 34
National Labor Relations Board
Hartford, Connecticut